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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

UNITED STATES OF AMERICA,

Petitioner,

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 103-127) is not reported. The opinion of the Circuit Court of Appeals (R. 346-354) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938. (R. 355.) A petition for rehearing (R. 355-357) was denied July 25, 1938 (R. 358). The petition for a

writ of certiorari was filed October 25, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where claims for refund of taxes overpaid for several years are denied and suit is thereupon brought in the District Court to compel the refund, whether jurisdiction to hear the suit is lost by reason of the circumstance that the only defense asserted is that taxes were owing for other years and that the overpayments have been credited against such other taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

STATEMENT

The respondents pleaded and proved that the corporation of whose estate they are trustees paid income taxes for 1922 to 1925 to a Collector of Internal Revenue who was not in office when this proceeding was begun, that claims for refund thereof were thereafter filed for a sum in excess of $10,000 (R. 1, 2-4, 134, 135-137, 78-80), and that the Commissioner of Internal Revenue rejected the claims and refused to make the refunds (R. 4, 15-23, 146, 239-240, 97, 98).

The respondents did not close their complaint at this point but instead proceeded to allege the reasons advanced by the Commissioner for his refusal to return the money and why such reasons were not well-founded. They pleaded and proved that the Commissioner, by execution of a closing agreement under Section 606 of the Revenue Act of 1928, had in fact acknowledged that the overpayments had been made (R. 6, 23-28, 144, 214-218, 88), but that he claimed

and determined, contrary to what was established upon the trial and is now settled and agreed (R. 347-354; Pet. 6), that there were tax deficiencies owing for 1921, 1926, 1927, and 1928, and that he applied the overpayments as credits against these deficiencies (R. 5-6, 10-12, 141-142, 145-146, 84-86, 95-97).

The courts below held that to the extent the deficiencies for 1921, 1926, 1927, and 1928 were erroneously determined the Commissioner had no lawful right to apply the overpayments thereto as credits and therefore was without lawful right to refuse to return the company's money, and ordered that to that extent the overpayments should be refunded. (R. 98-103, 347-354.)

ARGUMENT

The petition avers (Pet. 5) that the question of jurisdiction as here presented is an important one of which this Court should undertake review. We believe that such is not the case.

Jurisdiction of the District Courts in cases of this kind is governed by Section 24 (20) of the Judicial Code as amended, *infra*. Where, as here, the claim is one for the recovery of internal-revenue taxes in an amount exceeding $10,000 alleged to have been erroneously collected, the only requirements imposed by that statute are that it must appear (1) that the taxes were collected by a collector of internal revenue and (2) that such collector was out of office when the proceeding was commenced. See *Lowe Bros. Co. vs. United States*, 304 U. S. 302. Both requirements were met here (R. 1, 2-4, 135-137, 78-80), and the Government makes no assertion to the contrary. The obvious conclusion is that the trial court had power to entertain the suit. There is involved in it nothing of novelty or of unusual importance.

Fundamentally, so far as concerns the question of jurisdiction, the case is indistinguishable from scores of others that yearly pass through the District Courts.[1]

The Government rather assumes (Pet. 5-10) that the contrary must be true because of the circumstance that the Government was without or elected not to interpose any defense to the allegation of overpayment, but instead did no more than assert that it had the right to withhold the money in satisfaction of taxes which it claimed were owing for other years—an assertion which it is now determined was without foundation. The manifest answer is that jurisdiction once acquired is not lost because of the number or character of the

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[1] While jurisdictional requirements are governed by Section 24 (20) of the Judicial Code, there are certain other conditions which are essential to maintenance of suit when insisted upon but are not jurisdictional in character. Tucker vs. Alexander, 275 U. S. 228, 231. Most of them are prescribed by Revised Statutes, Section 3226, as amended by Section 1103 (a) of the Revenue Act of 1932, infra. In the interest of clarity we show compliance with such other conditions also:

a. Claims for refund must have been filed. They were. (R. 3-4, 135-137, 79-80.)

b. The claims must have been disallowed or six months must have expired without action by the Commissioner. Both occurred here, but it is sufficient to point out that the claims were disallowed August 31, 1933. (R. 4, 146, 239-240, 97, 98.) While the making of a credit in response to a claim for refund is of course an "allowance" of an overpayment in the sense that the Commissioner agrees that the taxes in question have been overpaid, the Government has often contended and the courts have uniformly held that the making of the credit is a rejection of the claim for refund. See Pratt & Whitney Co. vs. United States (Ct. Cls.), 6 F. Supp. 574, 576, 10 F. Supp. 148, 150, certiorari denied, 295 U. S. 760; Magee vs. United States (C. C. A. 2d), 61 F. (2d) 791, 795, certiorari denied, 289 U. S. 743; Jelke Co. vs. Smietanka (C. C. A. 7th), 56 F. (2d) 470, 473, certiorari denied, 300 U. S. 669. See also R. 105.

c. The suit must have been commenced within two years after rejection of the claims. It was. (R. 15, 109.)

d. Recovery must be sought on grounds specified in the claims. United States vs. Felt & Tarrant Co., 283 U. S. 269. That is the case here; the claims specified grounds on the basis of which the overpayments agreed upon in the closing agreement were determined. (R. 147, 97.) The agreement was of course conclusive in the absence of fraud, malfeasance, or misstatement of material fact, and by it the parties not only dispensed with the necessity of but also precluded alleging and proving the grounds specified in the claims. Wolverine Petroleum Corp. vs. Commissioner (C. C. A. 8th), 75 Fed. (2d) 593, 595-596. See R. 104-105, 69.

defenses interposed on the merits. Suppose, for example, that the petitioner had denied the fact of overpayment.[3] In that event the existence of jurisdiction would have been obvious, and presumably the Government would so concede. If upon trial, however, the proof adduced by the complainants had been sufficiently imposing to induce the Government to abandon that defense and to rely solely on the fact of credit to other years, no one would suppose that the exigencies of the Government's position could have had so far-reaching an effect as to have compelled the court to dismiss on the ground that its authority to hear terminated upon collapse of the first defense. Clearly, as the trial court pointed out (R. 106), the fact of credit is a matter of defense, not of jurisdiction.

Such obligation as the Commissioner has to credit overpayments against deficiencies determined for other years (Pet. 8-10) does not by its performance obliterate the fact of overpayment or the taxpayer's cause of action founded thereon, and *United States vs. Swift & Co.*, 282 U. S. 468 (Pet. 9-10), does not compel any other conclusion. It is true that suit was there brought for refund of an overpayment collected by credit (p. 469), but the sole question there discussed and decided related to the effective date of such col-

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[3]The petition impliedly assumes (Pet. 6-7) that the Government would have had no right to make such denial, on the ground that the fact of overpayment was established by the closing agreement. There is no warrant for any such assumption. The closing agreement would simply bear on the ultimate efficacy of the denial, not on the right to make it; before the Government could make its denial effective it would have the burden of establishing that the agreement was for some reason inoperative. See Section 606 of the Revenue Act of 1928, *infra*.

The allegations of the complaint as to why the Commissioner refused to make refund were of course matters of defense and technically surplusage in the complaint, just as were similar allegations by the plaintiffs in *Moore vs. United States*, *supra*, p. 794. Cf. *United States vs. First Wisconsin Trust Co.* (C. C. A. 7th), 92 Fed. (2d) 840, 845. They did not preclude the Government from interposing other defenses, including the defense that there were no overpayments.

lection; so far as the opinion indicates, no consideration whatever was given to whether suit for the year of overpayment by credit was proper, much less to whether the taxpayer could have sued for the year of overpayment in cash. Perhaps it is fair to indulge the presumption that this Court regarded, or at least assumed, that the procedure followed was permissible, but that is vastly different from saying that its decision is authority for the proposition that that procedure was exclusive and that the taxpayer could not have sued for the years of original overpayment—an issue not even in the case. The *Swift* decision does not support the petitioner's position; the question did not so much as lurk in the record. Cf. *Webster vs. Fall*, 266 U. S. 507, 511.

Perchance it is not going too far to say that the question did lurk in the record in *United States vs. Botany Worsted Mills* (C. C. A. 3d), 98 F. (2d) 880 (Pet. 13). But a reading of the opinion in that case demonstrates unmistakably (p. 883) that the decision there was made to turn, not on any jurisdictional issue, but on interpretation of the statute governing interest—whether the taxpayer should be permitted to receive an advantage over other taxpayers in all respects similarly situated except for the circumstance that their refunds were made at an earlier date.

The fact is that so far as we have been able to ascertain, there is no decision which by express holding is in conflict with the conclusion reached below. It is true that there are several cases in which it has been held that the taxpayer upon facts analogous to those at bar has a cause of action for the years to which the overpayments are applied as credits, but in none of them is it declared that there is no cause of action for the years of original overpayment or that the District Courts are without power to entertain suits for

such years.[8] On the other hand, *United States vs. Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867 (petition for a writ of certiorari pending, No. 416, October Term, 1938), is in complete accord with the decisions below, holding specifically (p. 868) that District Courts have jurisdiction in cases of this kind.

That the fact of credit is a matter going to defense, not to jurisdiction, is clear from what this Court recently said in *United States ex rel. Girard Co. vs. Helvering,* 301 U. S. 540. An overpayment had there been determined by the Board of Tax Appeals. The taxpayer brought mandamus to compel refund. It was held that mandamus was not the proper remedy and that the right to the refund should be determined by bringing a suit for refund. The Court said (pp. 542-543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, Sec. 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co. vs. United*

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[8] To this category belong such cases as United States vs. John Gallagher Co. (C. C. A. 6th), 53 F. (2d) 368; United States vs. Reeves Bros. Co. (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573, and Gans S. S. Line vs. Bowers (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676 (Pet. 12). The Court of Claims goes so far as to hold that suit may be brought only for the year of cash overpayment. Parks & Woolson Mach. Co. vs. United States, 58 F. (2d) 868, certiorari denied, 287 U. S. 634; Rosenstadt & Waller vs. United States, 7 F. Supp. 287; American Steam Conveyor Corp. vs. United States, 10 F. Supp. 571, certiorari denied, 296 U. S. 599. In this connection it is interesting to note the Government's suggestion (Pet. 9) that the respondents' "remedy" was to proceed in the Court of Claims for the years of collection by credit; had the suggestion been followed the respondents would of course have been turned out of court without a hearing on the merits.

Incidentally, the Rosenstadt decision, while agreeing with the Government's position (Pet. 10) that "it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years," takes sharp issue (pp. 288-289) with the suggestion that the year of overpayment must be the year of collection by credit rather than the year of collection in cash.

> *States,* 52 F. (2d) 1011, 1013-1014; *James vs. United States,* 38 F. (2d) 140, 143; *Ohio Steel Foundry Co. vs. United States,* 38 F. (2d) 144, 148-149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone vs. White, supra* [301 U. S. 532]; *Welch vs. Obispo Oil Co., ante,* p. 190; *Lewis vs. Reynolds,* 284 U. S. 281; *Crocker vs. Malley,* 249 U. S. 223.
>
> In view of what we have just decided in *Stone vs. White, supra,* it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund.

See also *Libby, McNeill & Libby vs. United States* (Ct. Cls.), 9 F. Supp. 673, 680, and *American Woolen Co. vs. United States* (Ct. Cls.), 18 F. Supp. 783, 788, 21 F. Supp. 125. Cf. *McEachern vs. Rose,* 302 U. S. 56, and *Stone vs. White,* 301 U. S. 532.

If it is permissible in a case of this kind to bring suit for the years of original overpayment, then of course there is no foundation for the Government's statement (pp. 10-11) that the decision below is in conflict with *United States vs. Felt & Tarrant Co., supra.* That case does not hold that the taxpayer may be compelled to file claims for refund, not only for the years of collection in cash, but also for the years of collection by credit. Such a rule, moreover, would have very little to commend it. The rules of pleading and procedure

give the Government all the protection it needs or is entitled to have; if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit was applied was not lawfully owing. Furthermore, there would be no point in a rule requiring the taxpayer to apprise the Government of the character and validity of its own defense, which the Government may or may not raise, as it chooses.[4]

The petition alleges (pp. 11-12) a conflict of views as to whether Sections 607 and 609 of the Revenue Act of 1928, *infra*, "prevent a credit of an overpayment for one year to a barred deficiency for another year from being considered a collection of the tax for the year of the deficiency, and hence corresponding confusion as to the proper year for suit."

Such conflict as there may be relates solely as to whether

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[4]In any event, the filing of a claim does not bear on jurisdiction. See note 1, supra.

In this connection it may not be amiss to observe that the issues sought to be raised by the petition relate not so much to the problem of jurisdiction as they do to the question of the proper year for suit—whether the taxpayer has a cause of action for the year of collection in cash or only for the year of collection by credit. Viewed in this light, the utter baselessness of the Government's contentions is even more readily apparent. Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If the argument in the petition be sound, the taxpayer would then have to file a claim for refund and sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, "reverses" the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new claim for refund and suit could go on forever. Cf. R. 107. It is not uncommon for the Commissioner to reverse a credit. He did it in Eastman Kodak Co. vs. United States (Ct. Cls.), 13 F. Supp. 435, 451, certiorari denied, 299 U. S. 581; American Woolen Co. vs. United States, supra, 16 F. Supp. 787, 788; Libby, McNeill & Libby vs. United States, supra, pp. 678, 679; Botany Worsted Mills vs. United States, supra, p. 852. The fact is that even in the instant case overassessments were abated (R. 85-86, 141-142), and the credits finally made were different from those set out in the certificates of overassessment (R. 97, 146). If a taxpayer may sue only for the year to which an overpayment is credited, manifestly the possibilities for wearing him down are just about unlimited.

suit will lie for the year of collection by credit; there is no conflict as to whether suit will lie for the year of collection in cash. Here the only year as to which collection by credit was barred was 1921. Had suit been brought for 1921 the question might have been important. However, since suit was not brought for that year, a decision on the point would not be dispositive so far as the instant case is concerned.

Moreover, the recent decision of this Court in *Stone vs. White, supra,* indicates quite clearly that the procedure followed at bar is proper. It was there said (p. 538) that Sections 607 and 609 "preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set-off or counterclaim."

CONCLUSION

The holding of the Circuit Court of Appeals that the District Court had jurisdiction is correct and there is no conflict of decisions; on the contrary, all decisions in which the question has been considered are in accord. Moreover, the question is not novel or important; the procedure followed is fundamentally indistinguishable from that commonly pursued and conforms with what this Court, in such decisions as *United States ex rel. Girard Co. vs. Helvering, supra,* has indicated is the approved course. In any event, it is agreed that upon the merits the respondents are entitled to prevail. The petition should be denied.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Judicial Code, Section 24, Par. 20th, as amended by the Act of February 24, 1925, 43 Stat. 972:

The district courts shall have original jurisdiction as follows:

* * *

* * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority of any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 1103:

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regula-

tions of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 606:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in ac-

cordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 607:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 609:

(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

Revenue Act of 1926, c. 27, 44 Stat. 2:

Section 284:

(a) Where there has been an overpayment of any income, war-profits, or excess-profits, tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.